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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 245

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
*Petitioner,*

*vs.*

CHARLES T. McKEOWN,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

HUGH GORDON,
Citizens Nat'l Bank Bldg.,
Los Angeles, California;

H. J. BISCHOFF,
1230 Bank of America Bldg.,
San Diego, California,
*Attorneys for Petitioner.*

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
*Petitioner,*

*vs.*

CHARLES T. McKEOWN,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

Southern California Freight Lines, a corporation organized and existing under the laws of the State of California, prays that a writ of certiorari issue to review the judgment of the United States Circut Court of Appeals for the Ninth Circuit in the above case entered April 21, 1945, petition for rehearing upon which was denied May 22, 1945. A certified transcript of the record in the case, which was printed under the supervision, direction and control of the Clerk of the Circuit Court of Appeals, including the proceedings and opinion in that court, has been filed by him together with ten copies of the record as printed below.

## Statement of the Matter Involved.

### (a) History of the Case.

Respondent brought suit in the United States District Court in and for the Southern District of California seeking additional compensation alleged to be due under the provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060, U. S. Code, Title 29, Sections 201-219), for unpaid overtime compensation, an additional equal amount as liquidated damages, and attorney's fees. The trial court awarded judgment to the respondent in the sum of $879.85, an equal amount as liquidated damages and $150.00 attorney's fees. (52 F. Supp. 331.) [R. 28-30.]

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the decision of the trial court. [R. 48-51.] Petitioner filed a petition for rehearing, which was denied. [R. 53.] Petitioner seeks certiorari to review the decision of the Circuit Court of Appeals.

### (b) Statement of the Case.

Petitioner is engaged in the transportation of property by motor vehicle over the public highways in the County of Los Angeles, State of California [R. 26] and served most points in Southern California. [R. 23.] It was stipulated between petitioner and respondent that Southern California Freight Lines is engaged as a common carrier in interstate commerce to the average extent of 7% of its total business. [R. 23.] Respondent was an employee of petitioner. It was further stipulated, and the trial court found pursuant thereto, that respondent in his employment by petitioner was concerned with and

connected with interstate commerce to the extent of 7% of his total activities during each and every day of each and every week during his said employment. [R. 24, 25.] It was admitted before the trial court that the business of petitioner was 93% intrastate and 7% interstate, and that respondent employee engaged in both intrastate and interstate activities but that his interstate activities for each week were 7% of his total activities. [R. 22, 23.]

In the trial court the petitioner contended that the interstate activities of respondent were not "substantial," within the meaning of this court's decision in *Walling v. Jacksonville Paper Company*, 317 U. S. 564, so as to bring him under the coverage of the Fair Labor Standards Act.

## Jurisdictional Statement.

The jurisdiction of this Court is invoked under U. S. Code ,Title 28, Section 347(a).

## The Question Presented.

Is an employer, whose business is substantially local and not interstate and whose employees' activities are both intrastate and interstate but only 7% of the activities of the employee are interstate, subject to the Fair Labor Standards Act?

## Reasons Relied Upon for Allowance of Writ.

(1) The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this court.

The Fair Labor Standards Act, 29 U. S. C. A., Sections 201 to 219, inclusive, under the provisions of Section 213

thereof excludes certain employments including agriculture, catching fish, seamen, switchboard operators in a small telephone exchange, but did not say what proportion of the employee's time and effort must be given to the excluded activity to effect an exclusion. In only one case does the statute prescribe a rule to govern employment in both intrastate and interstate activities (Section 213 (a) (2).) That section provides that any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce is exempted from the provisions of the act. All employees of carriers by air subject to the provisions of Sections 181 to 188 of Title 45, all employees of streets, suburban or interurban electric railways, or local trolley or motor bus carriers, and all employees of an employer subject to the provisions of Sections 1 to 27 of Title 49, are exempted (includes rails, pipelines and telegraph). The employees of all such employers are engaged in the business of transportation.

In the case of transportation by truck only such employees are exempted as to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49. This latter section has received an interpretation by this court in the case of *United States v. American Trucking Association,* 310 U. S. 534.

Employees of transportation companies not exempt under Section 213 (b), are subject to the provisions of the Fair Labor Standards Act if they have a substantial

amount of activity in Interstate Commerce. If 93% of the activity of the employee of the transportation company is intrastate or local, and only 7% is interstate, it would appear that Congress did not intend to confer the benefits of the Fair Labor Standards Act on such employees. In the case of retail or service establishments, the Act itself expresses the quantity of intrastate activity to work the exclusion. In the case of *Callus v. 10 East 40th Street Building*, 146 Fed. (2d) 438, decided by the Second Circuit Court of Appeals on December 12, 1944, it was stated in the opinion by Circuit Judge Frank who used this language, p. 440:

> "These tenants occupy about 26% of the rentable area of the building, and about 29% of the rented space. Thus, it may not be necessary to go beyond the activities of these tenants to determine that the maintenance employees are entitled to the benefits of the Act. The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. PR-19 (Rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretation of this Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are 'entitled to great weight.' *United States v. American Trucking Association*, 310 U. S. 534; *Skidmore v. Swift & Co.*, 65 Sup. Ct. 161. The Division's 20% standard seems to us a sensible one for the courts to adopt."

Notwithstanding that it was shown in this case that more than 20% of the activities of the maintenance em-

ployees of the 10 East 40th Street Building were engaged in activities in commerce, this Court on June 11, 1945, reversed the Second Circuit on the ground that Congress did not intend by the enactment of the Fair Labor Standards Act to "absorb by adjudication essentially local activities." It is of course true that this Court considered it material that the office building in which the work was performed was operated for the use of tenants of "unrestricted variety," and must therefore be considered a local business. Applying the provisions of the Fair Labor Standards Act to the foregoing facts, this Court said:

> "To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the states which Congress saw fit to reserve to them."

In the instant case, the employer operated almost exclusively within the confines of California. Less than 1% of the business of petitioner was transported by it across state lines. [R. 11.] The trial judge found that of its total business in the County of Los Angeles, State of California, 7% of it was in interstate commerce. [R. 26.] There is no finding by the trial judge that petitioner transported any portion across state lines. The facts present a case of a local business being subjected to the requirements of the Fair Labor Standards Act.

In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, this Court said at page 590:

> "we cannot be unmindful that Congress is enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

and in referring to this statement in the *Jacksonville Paper Company* case, *supra*, this Court in *10 East 40th Street Building, Inc. v. Callus, supra*, said:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The Ninth Circuit, in affirming the United States District Court decision, stated that it agreed with the opinion of the Tenth Circuit in the *New Mexico Public Service Company v. Engel*, 145 Fed. (2d) 636, where the activity of the employee in interstate commerce was only 4%. Petitioner does not believe that this Court meant to announce in *Walling v. Jacksonville Paper Co., supra*, that if the activities of the employee in interstate commerce amount to 4% of his total activities, such employee is covered by the Act. No petition for a writ of certiorari was applied for to review the decision of the Tenth Circuit in the *Engel* case, *supra*. One of the cases relied upon by the Tenth Circuit was *North Shore Corporation v. Barnett*, 153 Fed. (2d) 172, decided by the Fifth Circuit. In this case, North Shore Corporation petitioned this Court for a writ of certiorari, and on October 9, 1944, this Court granted the petition. Thereafter, the case was disposed of pursuant to the stipulation of the parties.

It should be authoritatively determined that an employer such as petitioner, which operates almost exclusively within the boundaries of a single state, whose intrastate activities and interstate activities are intermingled, and the activities of its employees in interstate commerce do not exceed 7%, is a local business which is not covered by the Fair Labor Standards Act.

(2) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The decision of the case at bar is probably in conflict with the holdings of this Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and in *10 East 40th Street Building, Inc. v. Callus*, decided by this Court on June 11, 1945. In the *Jacksonville Paper Company* case, wherein the activities of the employee were both in interstate and intrastate commerce, this Court held:

> "If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established . . . he is covered by the Act."

and further stated at page 590 of that case as follows:

> "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

In the *10 East 40th Street Building, Inc. v. Callus* case, this Court held:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The trial judge who heard the case at bar applied the principles applicable to the National Labor Relations Act rather than the Fair Labor Standards Act. [R. 18.] The trial Judge used this language:

> "The courts refusing to apply the Act, emphasize the incidental or casual character of the interstate operation involved. Evincing the disposition of Congress reference to National Labor Relations Act, but also pertinent here, the Supreme Court through Justice Stone declared:

"'Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the *maximum de minimis*. Labor Board v. Fainblatt, 306 U. S. 601. "The quantity of cement shipped out of a state is not *de minimis* merely because it is but a small percentage of respondent's total sales. . . . Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, destructive anomaly. Nor is the quantity of a particular product shipped out of state *de minimis* merely because it is small in proportion to the total interstate commerce in that produce from all the states or from employer's state." (N. L. R. B. v. Crowell Portland Co. (9th C. C.), 108 F. (2d) 198.'

"The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character." [R. 19-20.]

It is now determined by the Circuit Court of Appeals for the Ninth Circuit that:

"It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act. However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act.

"In this connection we have said in National Labor Relations Board v. Cowell Portland Cement Co., 108 F. 2d 198, 201,

" 'The quantity of cement shipped out of state is not *de minimis* merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 percent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly * * *.'

"We agree with the opinion of the Tenth Circuit in New Mexico Public Service v. Engel, 145 F. 2d 636, that an employee occupied in interstate commerce in an enterprise but four percent of which is interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged." [R. 50-51.]

(3) The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter. The decision of the Ninth Circuit in the case at bar is in conflict with the decisions of the majority of other circuits on the point at issue.

First Circuit—Court of Appeals: In *Walling v. Silver Bros. Co.*, 136 Fed. (2d) 168, decided May 21, 1943, the First Circuit clearly followed the princi-

ples enunciated in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and *Kirchbaum v. Walling*, 316 U. S. 517.

SECOND CIRCUIT—Court of Appeals: In *Fleming v. Arsenal Bldg. Corp.*, 125 Fed. (2d) 278, decided December 30, 1941, and *Callus v. 10 East Fortieth Street Bldg.*, 146 Fed. (2d) 438, decided December 12, 1944, employees were clearly engaged in a substantial amount of interstate activity.

THIRD CIRCUIT—Court of Appeals: In *Fleming v. Kirschbaum*, 124 Fed. (2d) 567, substantially all of the activities of the employees were in interstate commerce. Writ of certiorari was granted in this case, which affirmed the Third Circuit in the case entitled *Kirschbaum v. Walling*, 316 U. S. 517.

FOURTH CIRCUIT—Court of Appeals: *Bracey v. Luray*, 138 Fed. (2d) 8, decided September 16, 1943, and *Davis v. Goodman Lumber Co.*, 133 Fed. (2d) 52, decided February 2, 1943. Both of these cases turned on the fact that a substantial amount of interstate work was performed by the employees.

FIFTH CIRCUIT—Court of Appeals: *Super-Cold Southwest Co. v. McBride*, 124 Fed. (2d) 90, decided December 1, 1941, and *Fleming v. Jacksonville Paper Co.*, 128 Fed. (2d) 395, and *James V. Reuter v. Walling*, 137 Fed. (2d) 315, decided July 22, 1943. All turn on the fact that a substantial amount of activity in interstate commerce was shown by the employees. In this same circuit, the case of *North Shore Corporation v. Barnett*, 143 Fed. (2d) 172, de-

cided June 9, 1944, held to the contrary. This Court granted the writ of certiorari on October 9, 1944.

SIXTH CIRCUIT—Court of Appeals: *Crown Overall Mfg. Co. v. Walling,* decided May 7, 1945, celarly followed the holding of this Court in *Walling v. Jacksonville Paper Co., supra.*

SEVENTH CIRCUIT — Court of Appeals: *Walling v. Goldblatt Bros.*, 128 Fed. (2d) 778, decided June 25, 1942, showed that a substantial amount of activity of employees was in interstate commerce.

EIGHTH CIRCUIT—Court of Appeals: In *Walling v. Mutual Wholesale Food and Supply Co.*, 141 Fed. (2d) 331, decided March 8, 1944, and in *Schwarz v. Witner Grocer Co.*, 141 Fed. (2d) 341, decided March 9, 1944, the cases turned on the fact that the activities of the employees were of a substantial amount in interstate commerce.

NINTH CIRCUIT—Court of Appeals: None of the decisions of this circuit seem to have followed the principles laid down in *Kirschbaum v. Walling, supra,* and *Walling v. Jacksonville Paper Company, supra.* This Court seems to observe very little difference in jurisdiction between the National Labor Relations Act and the Fair Labor Standards Act. This Court seems to have placed greater emphasis upon the applicability of the doctrine of *"de minimis"* than on the doctrine of "substantial activity of the employee in interstate commerce."

TENTH CIRCUIT—Court of Appeals: In *New Mexico Public Service Company v. Engel,* 145 Fed. (2d) 636, decided November 3, 1944, the doctrine of "substantial employee activity" was not applied, but the Court seemed to think that if the doctrine of *"de minimus"* did not apply, the employee was covered by the Fair Labor Standards Act.

Wherefore, petitioner prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court, on the day to be designated, a full and complete transcript of record and proceedings in said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this court; that the judgment of the Circuit Court of Appeals be reviewed, and that petitioner be granted such other and further relief as may seem proper.

HUGH GORDON and
H. J. BISCHOFF,
*Attorneys for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
*Petitioner,*

*vs.*

CHARLES T. McKEOWN,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Opinions Below.

The opinion of the District Court here sought to be reviewed is reported at 52 Fed. (2d) 331. [R. 28-30.] The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 148 Fed. (2d) 890. [R. 48-51.]

### Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered April 21, 1945 [R. 51], and on May 22, 1945, the Court denied petition for rehearing without opinion. [R. 53.] The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 347 (a).

## Statement of the Case.

Respondent brought this action under the provisions of Section 7 and Section 16 (b) of the Fair Labor Standards Act of 1938, for overtime compensation and liquidated damage. Respondent alleged that petitioner was engaged in transporting goods in interstate commerce, and employed the respondent in the transportation of goods, wares and merchandise in and for interstate commerce. [R. 3.] In paragraph I of petitioner's answer to respondent's first amended complaint, it alleged that a very large percentage of its business consisted of intrastate traffic, and only a very small percentage consisted of interstate traffic, and that the hauling and carrying of merchandise to and from points outside of the State of California was less than 1% of the total hauling performed by petitioner. [R. 11.] It was stipulated by petitioner and respondent that petitioner, Southern California Freight Lines, was engaged as a common carrier in interstate commerce to the average extent of 7% of its total business. [R. 22-3.] It was also stipulated by petitioner and respondent that the activities of respondent in his employment by petitioner were concerned with and connected with interstate commerce to the extent of 7% of respondent's total activities during each and every day of each and every week in his said employment. [R. 24-5.] The trial court, in its conclusions of law, stated that the activities of respondent in his said employment during the period involved were sufficiently concerned and connected with the interstate operations of Southern California Freight Lines so as to bring his said employment under the provisions, and to entitle plaintiff to the benefits of said Fair Labor Standards Act, pursuant to Section 7 thereof; 29 U. S. C. A. 207; and pursuant to Section 16 thereof; 29 U. S. C. A. 216. [R. 27.]

## Specifications of Errors.

The Court erred in affirming the action of the trial court in granting judgment for the respondent upon the complaint and evidence before it.

## ARGUMENT.

The questions presented by the petition for writ of certiorari are under two points:

1. Respondent, employee, was not engaged in a substantial amount of activity in interstate commerce to entitle him to the benefits of the Fair Labor Standards Act.
2. Petitioner is substantially engaged in local business which Congress did not intend to bring within the purview of the Fair Labor Standards Act.

### 1. Respondent, Employee, Was Not Engaged in a Substantial Amount of Activity in Interstate Commerce to Entitle Him to the Benefits of the Fair Labor Standards Act.

The parties stipulated that the activities of respondent in Interstate Commerce was 7% of his total activities. The question is whether 7% is a substantial amount within the meaning of the decisions of this Court, particularly *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros.*, 317 U. S. 572, or within the meaning of the following decisions of the United States Circuit Court of Appeals:

*Walling v. Mutual Wholesale Food & Supply Co.*, 141 Fed. (2d) 331, of the Eighth Circuit, decided March 8, 1944;

*Walling v. Silver Bros. Co.*, 136 Fed. (2d) 168, of the First Circuit, decided May 21, 1943;

*Bracey v. Luray,* 138 Fed. (2d) 8, decided September 16, 1943, by the Fourth Circuit;

*Crown Overall Mfg. Co. v. Walling,* of the Sixth Circuit, decided May 7, 1945;

*Walling v. Goldblatt Bros.,* 128 Fed. (2d) 778, of the Seventh Circuit, decided June 25, 1942;

*Schwarz v. Witner Grocer Co.,* 141 Fed. (2d) 341, of the Eighth Circuit, decided March 9, 1944.

Petitioner does not contend that "substantial amount" necessarily means the same as "greater part," as the Fair Labor Standards Act requires in connection with retail or service establishments. The Administrator of the Fair Labor Standards Act has in many situations taken action if 20% of the employees' activities were in interstate commerce. In cases of employment in which the employee engages indiscriminately both in intrastate and interstate activities, it seems reasonable that at least 20% of the activities of the employee should be in interstate commerce before benefits of the Fair Labor Standards Act are applicable to him.

Circuit Judge Denman, who wrote the opinion for the Ninth Circuit, after quoting from the decision in *Walling v. Jacksonville Paper Company, supra,* to the effect that a substantial part of employees' activities must be shown in interstate commerce, stated as follows:

> "This statement throws no light on what percentage of an employee's time in interstate commerce is unsubstantial. Since the Act is concerned with wages and hours, it is apparent that if there had been a cut of 7% in the employee's pay check it would not

be regarded as unsubstantial or *de minimis* by any laborer or his union. Nor would a reduction of his 8-hour day of 7%, that is to 7 hours and 27 minutes, be regarded as unsubstantial. No leader of a labor union nor its members would regard such a reduction of the labor day an unsubstantial gain." [R. 50.]

The foregoing opinion leads to the conclusion that the Ninth Circuit is ignoring one important interpretation of the statute in question, namely, that Congress was faced with the policy of deciding to what extent it would exercise jurisdiction over intrastate activities. On this point, this Court stated in the *Kirschbaum* case, *supra*, on page 521, as follows:

"We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the states activities which, if isolated, are only local."

The Ninth Circuit Court did not apply the principles of statutory construction set forth in the quoted portion of the *Kirschbaum* case, *supra*. It appears fairly certain from the opinion of the Ninth Circuit that it considers

jurisdiction under the Fair Labor Standards Act and Wagner Act to be governed by the same principles. We quote from the opinion as follows:

> "It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act. However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act." [R. 50.]

One statement in the opinion of the Circuit Court leaves the impression that 7% of employee's activities was somewhat meager to constitute a "substantial amount." We quote again from the opinion:

> "It is also a proper inference that since the employee was engaged with reference to the bills of lading, it would take no more of his time on interstate than on intrastate bills. The longer interstate hauls with larger freight earnings would concern more than 7% of the employer's total income." [R. 50.]

We are at a loss to understand how the inference is justified that the respondent, employee, worked longer on interstate bills of lading than on intrastate bills of lading. Certainly the record is entirely silent on the subject. We assume, therefore, that the Court is also inferring that the interstate hauls consisted of transportation service by petitioner from or to points in California and to or from points in another state. The latter inference is also unfounded for the reason that the interstate traffic in which respondent participated with his services were shipments brought into Los Angeles, California, by other transportation agencies and distributed by petitioner to communities surrounding Los Angeles just as it transported local

traffic from Los Angeles to other points in Southern California.

We apologize for referring to some facts that are not fully covered by the record. We deem it important, however, not to leave an impression unanswered that the interstate activity engaged in by respondent consisted of transportation service of petitioner from or to a point in California and from or to a point in another state. There is no basis for the inference that petitioner received more revenue on an interstate bill of lading than he received on an intrastate bill of lading, or that interstate hauls were longer than intrastate hauls.

At the end of the opinion of the Circuit Court, the Ninth Circuit Court of Appeals states that it agrees with the opinion of the Tenth Circuit Court of Appeals in the *New Mexico Public Service Company v. Engel* case, 145 Fed. (2d) 636, wherein it appeared that the activity of the employee was only 4% of his entire activity. [R. 51.]

## 2. Petitioner Is Substantially Engaged in Local Business Which Congress Did Not Intend to Bring Within the Purview of the Fair Labor Standards Act.

The facts in this case show that petitioner is a local concern. The small amount of interstate traffic handled by it should not bring it within the controls of the Fair Labor Standards Act. We believe that the facts of the instant case bring it within the principles decided in the recent case of this Court in *10 East 40th Street Building Inc. v. Callus*, decided June 11, 1945. We quote from that decision as follows:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress

did not see fit to take over by legislation. Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

## Conclusion.

On the ground that the respondent did not perform a substantial amount of work in interstate commerce, and on the further ground that the business of petitioner is essentially a local business within the meaning of the Fair Labor Standards Act, we respectfully submit that this Court should review the decision of the Circuit Court of Appeals and reverse same.

Respectfully submitted,

HUGH GORDON,
Citizens Nat'l Bank Bldg.,
Los Angeles, California;

H. J. BISCHOFF,
1230 Bank of America Bldg.,
San Diego, California,

*Attorneys for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
*Petitioner,*

*vs.*

CHARLES T. McKEOWN,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Statement of Matter Involved.

Besides the facts stated by petitioner, respondent wishes to emphasize that in his employment in question he was engaged in checking and sometimes, but infrequently, handling the freight which passed over petitioner's dock on which there were employed approximately 50 to 60 men [R. 16, 23, 24], and that by stipulation between parties the trial court found that respondent's activities therein "were concerned with and connected with interstate commerce to the extent of 7%" of his "total activities during each and every day of each and every week of his said employment" [R. 24, 25].

## The Question Presented.

Respondent takes issue with petitioner's statement of the question which the latter has confined to whether it, as an employer, is subject to the Fair Labor Standards Act (hereinafter called the "Act"). It is only necessary and proper to decide here the question:

> "Is a freight checker for a motor transportation line covered by the Act when his activities in his employment 'were concerned with and connected with interstate commerce to the extent of 7% of' his 'total activities during each and every day of each and every week in his said employment?'" (*Kirschbaum v. Walling,* 316 U. S. 517.)

## Reasons Why Writ Should Not be Granted.

(1) Petitioner's attempt to have the Court exempt a common carrier motor freight line engaged in transportation, and in interstate commerce to the extent of at least 7% of its total business, as a "local" business is rather unique to say the least, and respondent is rather at a loss to understand why petitioner cited *10 East 40th Street Building v. Callus,* 89 Sup. Ct. 1244 (decided June 11, 1945) as giving any aid or comfort to its contention. In this *Callus* case this Court held that the plaintiff's occupation was not "necessary to the production of goods for commerce," and it did not in any manner turn on whether or not 7%, or any other percentage, would make a business "local."

Petitioner's reference to the allegation in its answer that less than 1% of its business was transported by it across state lines and that 93% of petitioner's business is intrastate (Pet'n for Writ, pp. 3 and 6) has little relevancy to the question at issue. "The percentage of the employ-

er's business intrastate as compared with that interstate proves little." (*Fleming v. Jacksonville Paper Co.*, 128 Fed (2d) 395.) The application of the Act is dependent upon the character of the employee's activities. (*Kirschbaum* case, *supra.*)

The fact, if it is a fact, that petitioner "operates almost exclusively within the boundaries of a single state" (Pet'n for Writ, p. 7), gives us no aid, and of course does not exempt petitioner or respondent from under the Act, for we are only concerned with one employee whose activities are admittedly at least 7% engaged in interstate commerce continuously from day to day and week to week throughout his entire employment, and an employer also admittedly so engaged to the average extent of 7% of its total busines [R. 23].

(2) Respondent does not feel that the decision by the Circuit Court of Appeals in the instant case is in any way in conflict with applicable decisions of this Court. Under the rule that a "substantial part" of an employee's activities must relate to goods in interstate commerce before he is covered by the Act (*Walling v. Jacksonville Paper Co.*, 87 S. Ct. 394, 317 U. S. 564), this Court has also stated in the same decision that "the question of the Act's coverage depends on the special facts pertaining to the particular business."

Further along this line this Court said in the *Callus* case, *supra*,

> "When these provisions (of Fair Labor Standards Act) first came here we made it abundantly clear that their enforcement would involve the Courts in the emperic process of drawing lines from case to case, and inevitably nice lines. (*A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. ed. 1638, 62 S. Ct. 1116.)"

Therefore, we should in this case ever keep in mind the type of interstate business performed by petitioner and by respondent in his employment. This Court has held that a rate clerk for a motor transportation company was covered by the Act. (*Overnight Motor Co. v. Missel*, 316 U. S. 512.)

Petitioner takes the District Judge to task for applying what it calls "the principles applicable to the National Labor Relations Act rather than the Fair Labor Standards Act" (Pet'n for Writ, p. 8). However, what the trial judge was doing was properly refusing to apply the general legal maxim "*de minimis non curat lex*" to the facts of this case. That doctrine, of course, when applicable upon the facts, is not confined to any one act, or any particular law or subject matter.

It appears that what petitioner is trying to say is that the *Jacksonville Paper* case, *supra*, and the Circuit Court cases cited by petitioner hold that there must be a substantial part of an employee's activities in interstate commerce; that 7% is not substantial; therefore, the decision of the Circuit Court is wrong. However, petitioner also tries to say that although 7% is not substantial it is also not inconsequential, *i. e.*, it is not unsubstantial, in its attempt to get around arguing that 7% is "*de minimis*" (Pet'n for Writ, p. 12). But petitioner's own cases do not uphold such an incongruous proposition. All cases cited by petitioner agree that a "substantial part" is necessary, and those that go into what amount is necessary to be substantial conclude that if the "*de minimis*" doctrine cannot be applied on the facts, the portion is substantial within the meaning of the *Jacksonville Paper* case.

As to petitioner's point number (2) then, there certainly is no conflict between the instant decision of the

Circuit Court of Appeals and the applicable decisions of this Court, but on the contrary the opinion in the case at bar is directly in line with such applicable cases. The *Jacksonville Paper* case did not hold that 7% is not substantial nor that 7% would be insufficient to bring an employee under the Act; and the *Callus* case turned on whether or not the occupations of plaintiffs were necessary to the production of goods for commerce and in no way held that "substantial part" meant at least 20%, as suggested by petitioner, or any other percentage. "A mathematical formula cannot be set up" (*Kirschbaum* case).

The Circuit Court and District Court cases which have applied the "substantial part" test set down by the *Jacksonville Paper* case and have had to go into the question of amount of interstate activity necessary have defined "substantial part" as meaning something worthwhile or of consequence or of substance as distinguished from something inconsequential, occasional, sporatic or isolated as will be further developed by discussion under the respondent's opposing argument to brief of petitioner.

(3) The Circuit Court of Appeals for the 9th Circuit has not rendered any decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter, in the opinion of respondent.

Of all cases of the Circuit Courts of Appeals cited by Petitioner, respondent is unable to find one that is in conflict with any of the others as far as applyng the rule involved, and, what is far more important none holds that 7% is not substantial; and furthermore, several cited by Petitioner as being in conflict with decisions of the 9th and 10th Circuits specifically point out that the meaning of "substantial" as it is applied under the Act to the

sections involved herein (Sec. 3(b) (29 U. S. C. A. 203(b), and Sec. 7(a) (29 U. S. C. A. 207(a)) means something more than a trifle or something opposite from or more than incidental, sporadic or inconsequential. In other words unsubstantial means *"de minimis."* (*Davis v. Goodman Lumber Co.*, 133 Fed. (2d) 52 (4th Cir.); *James Reuter v. Walling*, 137 Fed. (2d) 315 (5th Cir.); *Schwarz v. Witwer Grocer Co.*, 141 Fed. (2d) 341 (8th Cir.).)

As to the Second Circuit, respondent wishes to add the case of *Phillips v. Star Overall Dry Cleaning Ldy. Co.*, 149 Fed. (2d) 416, decided May 7, 1945, wherein the Court, speaking of the Act, stated on page 418:

> "As it appears that about four per cent of the cleaning and pressing which the appellant did for Star was of garments used in Star's interstate business and that the people were engaged in this work, it is obvious that if this was a production of goods within the statute it was a production of goods for interstate commerce."

As to the cases cited under the Tenth Circuit, respondent wishes to add *Walling v. Peoples Packing Company*, 132 Fed. (2d) 236, decided Dec. 16, 1942, wherein it was held that 6½% to 10% was a "substantial part" and sufficient to bring the plaintiff under the Act.

As to *New Mexico Public Service Company v. Engel*, 145 Fed. (2d) 636, it is interesting to note that it cites with approval several of the cases in various Circuits which decisions Petitioner claims are in conflict with the *New Mexico* case and the case at bar.

To summarize: (1) the business of Petitioner is not a "local business" within the reference by this Court to

exempting such under the Act; (2) the instant decision is not in conflict with opinions by this Court, but on the contrary is directly in line with them, and particularly the *Jacksonville Paper* case; (3) decisions by other Circuit Courts are not in conflict with the case at bar, but apparently all agree with and follow the *Jacksonville Paper* case.

One further matter respondent feels is only fair, because of the appeal to the Circuit Court and petitions herein and because only $150.00 attorney's fees were allowed by the District Court (which obviously did not contemplate appeal work) attorney fees on appeal and on this opposition to Writ of Certiorari should be awarded to respondent. Second Circuit recently allowed $400.00 attorney's fees on appeal. (*Phillips v. Star Overall Dry Cleaning Laundry Co.*, 149 Fed. (2d) 416 (decided May 7, 1945).) This Court has jurisdiction (29 U. S. C. A. 216).

Wherefore, respondent prays that Petitioner take nothing by his Petition for Writ of Certiorari; that a Writ be denied; that attorney's fees on defense to the appeal to the Circuit Court and in opposition to the Petition herein be allowed to respondent with costs.

Respectfully submitted,

GORDON LAWSON,

ALFRED F. BAUGHN,

*Attorneys for Respondent.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
*Petitioner.*

*vs.*

CHARLES T. McKEOWN,

*Respondent.*

## OPPOSING ARGUMENT TO BRIEF OF PETITIONER.

It is respondent's contention that 7% under the facts in the case at bar is a "substantial part" within the meaning of the decisions of this Court, particularly *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and that the Circuit Court cases cited by Petitioner on pages 17 and 18 of his Petition for Writ of Certiorari are directly in line with the Ninth Circuit decision in the instant matter. Therefore, discussion of these will be made in the order in which Petitioner has named them.

In *Walling v. Mutual Wholesale Food & Supply Company*, 141 Fed. (2d) 331 (8th Cir.) decided March 8, 1944, the Court stated at page 340:

> "This Act is remedial and should be liberally construed and applied, *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2d) 52, 56, Eighth Circuit,"

and held that such plaintiff employees as did a substantial amount of interstate activities for any week were within the Act.

The employer in *Walling v. Silver Bros. Co.,* 136 Fed. (2d) 168 (decided May 21, 1943), was a large wholesale grocer whose out-of-state purchases were approximately 2 to 3 per cent of his gross per year. The Court did not explain the division of the plaintiff's activities, but concluded that since the lower court held they were not engaged in interstate commerce "that the District Court must have found that an unsubstantial portion of their employment was in interstate commerce." However, the Circuit Court went on to state that assuming their "activity consumed a substantial portion of their time" it would have to hold that the employees although engaged in interstate commerce would not come under the authority of the Wage & Hour Administrator because of the exemption in Section 13(b)(1) of the Act which brought them under the jurisdiction of the Interstate Commerce Commission.

The Court in *Bracey v. Luray,* 138 Fed. (2d) 8 (decided September 16, 1943), Fourth Circuit, stated at page 10 that the gross sales of defendant "averaged per year only approximately $5,000, or less than 4% of the defendant's total annual gross business." However, the Circuit Court did not have to decide whether less than 4% was substantial, stating on page 12:

> "Since the plaintiffs were engaged in commerce within the meaning of the Act as to practically all of defendant's business, therefore, and not merely as to the 4% embraced in true interstate sales, questions as to allocations of time between interstate and intrastate business need not be considered."

The next Circuit Court case cited by the Petitioner, to-wit: *Crown Overall Mfg. Co. v. Walling,* Sixth Circuit (decided May 7, 1945), cited with approval the *Jacksonville Paper* case, *supra,* and *Walling v. Mutual Wholesale Food, supra,* but no facts as to allocation of the activities of plaintiffs was given.

Likewise there are no facts in *Walling v. Goldblatt Bros.,* 128 Fed. (2d) 778, Seventh Circuit (decided June 25, 1942), as to the division of time spent by the employees involved.

In the Eighth Circuit Court case of *Schwarz v. Witwer Grocery Co.,* 141 Fed. (2d) 341, the employees in the wholesale warehouse only "occasionally" help unload interstate shipments without further proof as to how long or how often they did so, the Court holding that these employees had the burden of proving "that they were engaged in interstate commerce, or that a substantial part of (their) activities were in interstate commerce. They only proved that a *very incidental* part of their activities was in such commerce. They failed to make a case." This just follows the *"de minimis"* rule. (Emphasis added.)

Petitioner is admittedly a common carrier engaged in interstate commerce to the extent of 7% of its total business [R. 22, 23, and Petn. for Writ, p. 2], which is transportation—since appellant is a motor freight line. Respondent was a transportation employee working regularly and continuously for this interstate instrumentality in the very channel and stream of commerce. Thus he should be entitled to benefits of the Act (Buls. No. 1 and No. 5), because there is no delimitation therein on quantity or volume of interstate activities; and judicially the only limitation has been by application of the *"de minimis"* doctrine.

"Substantial part" is a relative and flexible term to be gauged by all the circumstances surrounding the situation. (*Fuhrman v. American N. B. & L. Assn.*, 126 Cal. App. 202.) In so far as amounts or proportions of a given thing or period of time are concerned the word "substantial" may have two different meanings; something worthwhile as distinguished from something without value or merely nominal. (*In re Krause's Estate*, 21 Pac. (2d) 268, 173 Wash. 1.) "That is of moment; important; essential, material;"—(Webster's New Inter'l Unabr. Dict., 2d Ed.) It also may mean "considerable in amount, value or the like; large." (Webster's, *supra.*)

In view of the liberal and wide scope to be given the Act as set forth in the Congressional findings and declarations of policy (Sec. 2 of Act, 29 U. S. C. A., Sec. 202), which have been so frequently emphasized by the courts (*U. S. v. Darby*, 312 U. S. 100, 61 S. Ct. 451; *Fleming v. Hawkeye etc. Co.*, 113 Fed. (2d) 52:—"We must assume that all employees in interstate commerce, so far as reasonably possible, should be made subject to the provisions of the Act"), the proper interpretation, at least where the employee is actually engaged in transportation in interstate commerce, should be, and by most of the cases cited herein, has been to include employees in positions similar to respondent's, and especially here where the employee is not under jurisdiction of the Interstate Commerce Commission because his activities do not "affect safety of operation" [R. 14, 15], but who nevertheless works a part of each day of every week directly on interstate freight items [R. 16, 17, 24, 25]. In this connection and under this situation certainly "substantial" means something worthwhile; something of actual value; some-

thing sufficient to take notice of—more than a *"minimis."* Under this meaning, surely 7% is substantial here.

Respondent contends that 7% is substantial and is sufficient where it is a part of every day of every work-week as here. Where the amount is unsubstantial the doctrine of *"de minimis non curat lex"* is applied, but only to isolated, occasional, infrequent, inconsequential, causal or sporadic activities in interstate commerce. (*James V. Reuter v. Walling,* 137 Fed. (2d) 315, decided July 22, 1943, Fifth Cir.; *Davis v. Goodman Lbr.,* 133 Fed. (2d) 52, Fourth Cir.; *Walling v. Peoples Packing Co.,* 132 Fed. (2d) 236, Tenth Circuit, decided Dec. 16, 1942; *New Mexico Public Service Co. v. Engel,* 145 Fed. (2d) 636, Tenth Cir.; *Berry v. 34 Irving Place Corporation,* D. C. N. Y. 1943, 52 Fed. Supp. 875; *Mile High Poultry Farms v. Frazier,* Colorado Supreme Court (Mar. 5, 1945), 157 Pac. (2d) 125; *McDaniel v. Clavin,* 22 Cal. (2d) 61, 136 P. (2d).)

In the *James V. Reuter* case, *supra,* the Fifth Circuit held that ½ to ⅓ of 1% was a "trifle" and therefore not substantial. The total sales of defendant employer in interstate commerce was 5% but the plaintiff's activities only touched less than 1% of this interstate business.

The employer in the *Davis* case, *supra,* manufactured only certain parts for rollers but performed less than 10% of the manufacture of the total parts thereof, and of the rollers handled by defendant company only 25% were sold outside the state. The Circuit Court said on page 53 that although the roller business was small compared to the proceeds of the retail sales "it was nevertheless substantial; and the manufacturing operations were continuous for two years or more and required the services of at least two workers and a foreman." The two plaintiff workmen in-

volved in this particular activity were *continuously* engaged therein and the Court held they were covered by the Act but that other employees whose contact with the interstate business was only *incidental* were not under the Act because their services in interstate commerce were too unsubstantial. (Emphasis added.)

As previously stated the *Peoples Packing Company* case, *supra,* held that 6½% to 10% was substantial.

The Tenth Circuit Court in the *New Mexico Public Service* case, *supra,* held that 4% was substantial, saying at page 640:

> "If the services he (plaintiff employee) performs are essential to the movement of commerce and not merely *sporadic and isolated,* he is engaged in commerce within the meaning of the Act. *U. S. v. Darby,* 312 U. S. 100; *Walling v. People's Packing Co.,* 132 Fed. (2d) 236; *North Shore v. Barnett,* 143 F. (2d) 172; *Sun Pub. Co. v. Walling,* 140 Fed. (2d) 445," and other cases.
>
> "The generation of electricity for use in the movement of interstate commerce was a part of the *work-a-day duties* of the employee, and his contribution in that respect was both *consistent and continuous.*" (Emphasis added.)

The Supreme Court of Colorado in *Mile-High Poultry Farms, supra,* discusses application of the "substantial part" rule as to percentages and allocation of activities as decided by the Federal courts. It is good and rather exhaustive. There the Court held that "slightly more than 1%" was unsubstantial, and, therefore, the rule *"de minimis"* applied.

The Federal cases therein cited and quoted show that when that portion of the activities in interstate commerce

is "incidental," "inconsequential," "sporadic," "negligible" or "unsubstantial" it does not constitute a substantial part of the employee's work within the meaning of the *Jacksonville Paper* case decision. These words were actually used in the Federal cases cited.

In *Berry v. 34 Irving Place Corporation, supra,* it was held that the phrase "substantial part" as used in the *Jacksonville Paper* case, *supra,* is not a phrase of mathematical precision but is the converse of unsubstantial or immaterial and the word "substantial" as so used does not mean the same as when used in the phrase "substantial performance of a contract."

The California Supreme Court held in the *McDaniel v. Clavin* case, *supra,* that certain transactions in interstate commerce by plaintiff employee were isolated and sporadic and "too inconsequential" to bring him under the Act.

In Conclusion respondent feels that he has proved that a substantial portion of his activities in his employment for petitioner was in interstate commerce, sufficient to bring him under the Act in question, and that the decisions below of the District Court and the Circuit Court are correct and that plaintiff like the rate clerk in *Overnight Motor Company v. Missel,* 316 U. S. 512, is entitled to benefits of the overtime provisions of the Fair Labor Standards Act; and, therefore, respondent respectfully requests this Court to deny the Writ of Certiorari, but if issued, that the decision of the Circuit Court be affirmed, with costs and attorney's fees on appeal to respondent.

Respectfully submitted,

OTIS J. BAUGHN,
ALFRED F. BAUGHN,
*Attorneys for Respondent.*

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 245

SOUTHERN CALIFORNIA FREIGHT LINES,
a corporation,

*Petitioner,*

*vs.*

CHARLES T. McKEOWN,

*Respondent.*

## PETITION FOR REHEARING.

HUGH GORDON,
Citizens Nat'l Bank Bldg.,
Los Angeles, California;

H. J. BISCHOFF,
1230 Bank of America Bldg.,
San Diego, California,

*Counsel for Petitioner.*

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

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SOUTHERN CALIFORNIA FREIGHT LINES,
a corporation,

*Petitioner,*

*vs.*

CHARLES T. McKEOWN,

*Respondent.*

## PETITION FOR REHEARING.

Petitioner, Southern California Freight Lines, respectfully prays for a rehearing and reversal of the order hereinbefore entered on the eighth day of October, 1945, denying its petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit, on the following grounds:

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions in other circuit courts on the quantity of employee's time devoted to interstate activity necessary to bring employees within the coverage of the Fair Labor Standards Act.

(2) It is also in conflict with the decision of this court in the case of *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, holding that

> "If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established . . . he is covered by the Act."

(3) The meaning of "substantial part" as used by this court in the case of *Walling v. Jacksonville Paper Co., supra,* is so much in conflict that an authoritative decision in the case is a matter of great importance.

I.

The Circuit Court of Appeals for the Ninth Circuit declared that it was its view that the requirement of "substantial amount" is met if

> "The activities of the employee were not casual or spasmodic, but rather a continuous, regular and integral part of his everyday and everyweek business."

This Court also stated that it agreed with the opinion of the Tenth Circuit Court in *New Mexico Public Service v. Engel,* 145 F. (2d) 636, holding that it met the requirement of "substantial amount," although only 4% of the activities of the employee were in interstate commerce.[1]

Petitioner desires to call to this Court's attention decisions in other jurisdictions which have placed a definite and contrary interpretation upon the meaning of "substantial amount" in connection with coverage under the Fair Labor Standards Act. Before referring to such cases, petitioner wishes to point out that the research of its counsel has disclosed that the decisions of the Ninth and Tenth United States Circuit Courts are in conflict with the decisions of the other circuits.

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[1]"We agree with the opinion of the Tenth Circuit in *New Mexico Public Service v. Engel,* 145 F. (2d) 636, that an employee occupied in interstate commerce in an enterprise but 4 percent of which is in interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged." (R. 50-51.)

In the case of *Vogelpohl v. Lane Drug Co.*, 55 F. S. 564, decided June 12, 1944, the employees devoted approximately 5% of their time unloading merchandise from trucks and railroad cars from points outside of the State of Ohio. The remaining 95% of their time was devoted to strictly intrastate activity. The District Judge held that 5% did not constitute a substantial amount of the employees' time in interstate commerce. That Court expressed the opinion that it should be guided by the regulations of the Administrator of the Fair Labor Standards Act, and further stated that in the regulations of the Administrator 20% to 25% was determined as the percentage satisfying the word "substantial."[2]

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[2]*Vogelpohl v. Lane Drug Co.*, 55 F. S. 564, 6/12/44 (Ohio 6th Cir.) p. 565: "The plaintiff and intervening plaintiffs devoted approximately 5% of their time to unloading from trucks and railroad cars merchandise received from outside the State of Ohio, and in wrapping and labelling packages of merchandise to be shipped outside the State of Ohio."

"The remaining 95% of their time was devoted to checking the merchandise received, unwrapping, labeling and placing it on shelves, storing, checking, sorting, wrapping and loading the same, and filling orders for distribution to the defendant's various retail stores. From 12-18-38 to 6-30-38, the work week was 61 hours, and thereafter was 60 hours. . . ."

(P. 567.) "The court is of the opinion that this work in interstate commerce did not constitute a substantial part of the employee's time. In determining what is a substantial portion of an employee's time, this court is not without some guidance, even though there is not a great deal of authority. In various regulations of the Administrator, 20 to 25% appears to be the percentage determined upon as defining the word 'substantial' . . ." (Here appear examples of the Order.)

"In the case of *Anuchick v. Transamerican Freight Lines*, D. C. 46 F. S. 861, Judge Picard, while stating that he personally did not believe that 20% is a substantial part of 100%, nevertheless gave effect to these interpretations of the meaning of 'substantial' without determining just what is a substantial portion of an employee's time. I am of the opinion that, in this case, 5% or approximately 3 hours per week, devoted to work in interstate commerce does not constitute a substantial portion of the employee's time."

The foregoing case arose in the State of Ohio and is in the Sixth Circuit. A later case, decided May 7, 1945, by the Sixth Circuit Court is in harmony with this decision and is the case of *Crown Overall Mfg. Co. v. Walling.*

In the case of *Snyder v. John J. Casale,* 49 F. S. 926, decided March 5, 1942, the District Judge held that 10% was not substantial. This case arose in the State of New York which is in the Second Circuit Court of Appeals.

The case of *Zaharian et al. v. Brown Material,* reported in seven labor cases 64951, and decided October 1, 1943, holds that 7% is not enough. This case arose in the Ninth Circuit and obviously is in conflict with the decisions of that court.

In the case of *Berry v. 34 Irving Place Corp.,* 52 F. S. 875, the District Judge declared that the words "A substantial part" is not a phrase of mathematical precision. On this point the Judge stated as follows:

> " 'A substantial part' is not a phrase of mathematical precision. For the purposes under consideration, I think it is satisfied by less than 50%. I do not think that in the context in which it is used by the Supreme Court, 'substantial' means the same as when it is used in the phrase 'substantial performance of a contract.' I construe the language to mean the converse of 'insubstantial or immaterial.' See Schainman v. Dean, 24 F. (2) 475.[3] By such a standard,

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[3]"Under Bulk Sales Act (C. C. 3440) declaring that sale of stock of merchandise without recording notice thereof at least seven days before consummation of sale in county recorder's office, shall be conclusively presumed to be fraudulent and void as against vendor's existing creditors. The fact that purchase money de-

> I find that a substantial part of plaintiff's activities was in the production of goods for commerce."

In *Cody et al. v. Dossin's Food Products*, recently decided by the United States District Court, Eastern District of Michigan, on October 5, 1945, and reported in eight Wage and Hour Reports 899, it was held that 2.7% is not a sufficient sum to constitute a substantial part. This judge used the following language in his opinion:

> "What constitutes a substantial part of an employee's activities has not been defined and we find it unnecessary to define this question here. However, by no test can 2.7% be considered substantial."

The foregoing case arose in the State of Michigan and is, therefore, in the Second Circuit. In this same Circuit was a decision in the case of *Fleming v. Post*, 146 F. (2d) 441, decided on December 14, 1944, declaring that 20% was necessary to constitute substantial. On this point the court said, on page 443:

> "In determining whether a substantial portion of the building is occupied by tenants engaged in the production of goods for interstate commerce, we have adopted the measure of 20% suggested by the Administrator. See Callus v. 10 East 40th St. Bldg., Inc., 146 F. (2) 438. In fact, during the years 1938, 1940, 1941 and 1942, about 25% of the

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rived from such sale was paid to certain of bankrupt's creditors would of itself constitute no defense to trustee's action at law to recover the goods or their value under Bankruptcy Act."

"Finding that bankrupt's sale of merchandise worth $4000.00 out of a total stock of goods valued from $20,000.00 to $25,000.00 involved a 'substantial part' of the stock in trade within (C. C. 3440) . . . held warranted in view of fact that almost the entire stock was sold at about the same time in same manner."

building was occupied by tenants engaged in manufacturing goods for interstate commerce."

A very persuasive argument is contained in the dissenting opinion of Circuit Judge Sibley in the case of *North Shore Corp. v. Barnett*, 143 F. (2d) 172. In a footnote below we quote a portion of his opinion, beginning with page 177.[4]

The majority opinion in the case of *North Shore Corp. v. Barnett, supra*, did not hold that a "substantial amount" of activity in commerce on the part of the employee need not be established but decided that the law laid down in *Walling v. Jacksonville Paper Co.* was

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[4]The Act itself, in Sec. 13, excluded certain employments, etc. In only one case was attention given to a possible mixed employment, in excluding "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in interstate commerce." Performance is here made the test as between service in interstate and in intrastate commerce. *It is a logical and reasonable test, and would afford a fair test in all mixed employments.* This court, however, in *Fleming Adm'r v. Jacksonville Paper Co.*, 128 F. (2d) 395, 7, suggested that if "a substantial part" of the employee's mixed work was in interstate commerce it was enough. That language was repeated by the Supreme Court on review of the case, 317 U. S. 564. That may be said to be the judicial formula. After the decision of *Kirschbaum Co. v. Walling*, 316 U. S. 517, which applied the Act to the maintenance employees of the owner of a building whose tenant was using it wholly for the production of goods for commerce, the Administrator was confronted with the case of a building only partially used for such production. He applied the judicial formula of "substantial part" and by a rule published 10-17-42, directed that 20% should be considered substantial. When he had a case of mixed employment by trolley and bus carriers, exempt under Sec. 13(a), he on 3-6-44 applied the same ratio of 20%. We therefore have the legislative suggestion of preponderance, the judicial formula of substantial part, and the administration crystallization of 20% to choose between. But no choice need be made, because the fact findings are that the admixture of interstate commerce done was not extensive, nor even "substantial" and certainly nowhere near 20%.

not applicable to employees having to do with maintenance or operating instrumentalities of commerce.[5]

The *North Shore* case was relied upon by the Tenth Circuit in the case of *New Mexico Public Service v. Engel,* 145 F. (2d) 636. The later case, however, did not draw the line that Circuit Judge Lee attempted to draw in the case of *North Shore Corp. v. Barnett, supra.* Circuit Judge Lee contended that his opinion was in accord with the decision of this court in *Overstreet v. North Shore Corp.,* 318 U. S. 125. It is respectfully submitted that this conclusion of Circuit Judge Lee was incorrect, as was fully pointed out in the dissenting opinion of Circuit Judge Sibley.[6]

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[5]"The law as laid down in *Walling v. Jacksonville Paper Co., supra,* is applicable to that class of cases which deals with employees whose duties relate in part to interstate shipments. It is not applicable to that class of cases which deals with employees having to do with maintenance or operation of instrumentalities of commerce. Employees in the first class engage during the same work week in activities strictly intrastate in character. Employees in the second class of cases, as here, engage in the same type of activities throughout each work week." (*North Shore Corp. v. Barnett,* 143 F. (2d) 172.)

[6]"This, I think, is a serious misunderstanding of the *Overstreet* decision. The sole contention there was that the employer was not the carrier of interstate commerce, and therefore, as the court states it, 'their (the employees') activities are local and at most only affect commerce,' 318 U. S. 125, 128, 87 L. Ed. 656. There was no question as to the amount of interstate commerce done, *for the petition,* the court says, alleged: 'The toll road constitutes an integral part of the highway system of the U. S. . . . It is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce. Mail to and from other states as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road. . . . We think these allegations bring petitioners within the coverage of the Act and entitle them to recover if proved.' The Court then settled the contention made assuming *'extensive'* interstate transportation actually done, and held the work of the employees was close enough to that of transportation to be practically a part of it. It certainly did not say how much of a mixed employment must be in interstate commerce, in order to apply the Act; which is the present question."

In the case of *Walling v. Mutual Wholesale Food and Supply Co.*, 141 Fed. 331 (8th Cir.), the court made it very clear that the relative time devoted to intrastate and interstate activity must be established by the employee who seeks the benefits of the Act. On page 339 this Court said:

> "Since all of these four companies did intrastate business as well, it is necessary to examine as to which employees of each devoted *such substantial portion of their time and efforts* to this interstate business as to bring them within the Act." (Emphasis supplied.)

In the case of *Walling v. Peoples Packing Co.*, 132 F. (2d) 236, it was shown that the Peoples Packing Company owned and operated a packing plant at Oklahoma City, Oklahoma, at which it engaged in the slaughter of cattle and hogs and the manufacture of beef and pork products. The average number of employees was approximately forty-five, of which four to seven were employed in the slaughtering department. The output of the packing house consisted of edible meat and meat products which were sold in intrastate commerce and inedible by-products which were sold in interstate commerce. The employees in the slaughtering department devoted most of their time in the removal of hides and the inedible portions from the carcasses.[7]

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[7]"While the primary object of the work of the employees in the slaughtering department is to produce edible meat and meat products, the *major portion of their manual efforts* is exerted in the removal of the hides and the inedible portions from the carcasses, thereby producing valuable by-products." (*Walling v. Peoples Packing Co.*, 132 F. (2d) 236.)

The foregoing case was also relied upon by the Tenth Circuit in *New Mexico Public Service v. Engel, supra,* and clearly does not constitute authority for the decision reached by the Tenth Circuit in the foregoing case.

In the case of *Bracey v. Luray,* 138 Fed. 8 (4th Cir.) the Court held that it was not necessary to allocate the time between interstate and intrastate business, because it was practically all of defendant's business in interstate commerce and not merely 4%.[8]

II.

Although the Circuit Court of Appeals for the Ninth Circuit states that it is following the rule of this Court as laid down in *Walling v. Jacksonville Paper Co., supra,* it is actually following the erroneous holding of the Tenth Circuit in *New Mexico Public Service v. Engel, supra.* The Tenth Circuit lays down the rule that the volume or percentage of an employee's activity in interstate commerce is not the test and states that the test is whether the services the employee performs are essential to the movement of commerce and *not merely spasmodic and isolated.* It is inconceivable that this court would use the

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[8]"Since the plaintiffs were engaged in commerce within the meaning of the Act as to practically all of defendant's business, therefore, and not merely as to the 4% embraced in direct interstate sales, questions as to allocations of time between interstate and intrastate business need not be considered." *Bracey v. Luray,* 138 F. (2d) 8, 12.)

words "substantial part" if it was not using those words in a relative sense.[9]

This Court in *Kirschbaum v. Walling*, 316 U. S. 517, expressed what it considered the intent of Congress in enacting the Fair Labor Standards Act. The principles enunciated in that decision are inconsistent with the assumption of the trial court and the Ninth Circuit Court of Appeals that 7% constitutes a "substantial part" of 100%. The principles enunciated in the *Kirschbaum* case, *supra*, were again repeated by this court in the case of *10 East Fortieth Street Bldg., Inc. v. Callus et al*, decided June 11, 1945.

## III.

Although this Court has shown that a "substantial part" of the employee's activity must be in interstate commerce to have the benefits of the Fair Labor Standards Act, there is no generally accepted definition of the term "substantial part". The Administrator of the Fair Labor Standards Act has prescribed the quantity of interstate commerce essential to meet the requirement of "substantial part." In most cases the Administrator has declared that 20%

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[9] "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the states activities which, if isolated, are only local."

constitutes a "substantial part". In referring to these regulations, the Second Circuit Court of Appeals, in the case of *Callus v. 10 East Fortieth Street Bldg.*, 146 F. (2d) 438, said as follows:

> "The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. Pr.-19 (Rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretation of the Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are 'entitled to great weight.' *U. S. v. American Trucking Assoc.*, 310 U. S. 534; *Skidman v. Swift & Co.* 65 S. Ct. 161. The Division's 20% standard seems to us a sensible one for the courts to adopt."

The Circuit Court of Appeals for the Ninth Circuit holds that "substantial amount" is the converse of "unsubstantial". It is submitted that to say this throws very little light on what this Court meant when it used the words "substantial amount." In *Overstreet v. North Shore Corp., supra*, this Court held a complaint good which alleged that the employees engaged in extensive activity in interstate commerce. It is submitted that quantitatively speaking, the word "extensive" is synonymous with "substantial".

We have heretofore referred to the dissenting opinion of Circuit Judge Sibley in the case of *North Shore Corp. v. Barnett, supra*, indicating that the words "substantial part" were used in a quantitative sense. The meaning of the word "substantial" in various statutes has been

before the courts. In the case of *Schainman v. D* 24 F. (2d) 475, it was held that a sale of a stock merchandise in the sum of $4000.00 was a "substa part" of $20,000.00 to $25,000.00, within the meanin Sec. 3440 of the Civil Code of the State of Califo (Bulk Sales Act). The Court concluded its opinio that connection by stating that it was warranted in fin that $4000.00 was a "substantial part" in view of fact that almost the entire stock was sold at about same time in the same manner.

The U. S. Revenue Laws contain the words "substa part" in connection with defining a bank. U. S. Cal. Sec. 104.[10] In interpreting these words the U. S. Ci Court of Appeals for the Fourth Circuit, in the cas *Magruder v. Safe Deposit Trust Co.* 121 F. (2d) decided as follows:

> "The word 'substantial' as used in a provisi Internal Revenue Act that losses from sale of tal assets by trust company, a substantial par whose business is receiving deposits, are not subject

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[10] "(a) As used in this section the term 'bank' means a bank or trust company incorporated and doing business under the laws of the United States, of any State or of any Territory, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under Section 11(k) of the Federal Reserve Act, 38 Stat. 262, as amended, and which is subject by law to supervision and examination by State, Territorial or Federal authority having supervision over banking institutions.

"(b) Bank shall be taxable in the same manner as other corporations, except that they shall not be subject to the surtax imposed by Section 14, and except that the normal tax imposed by Section 13 shall be at the rate of 15% instead of at the rates provided in such section."

to limitation of $2500.00, is used in a relative, rather than *in an absolute or arbitrary sense.*" (Emphasis supplied.)

We believe this Court used the words "substantial part" in a relative sense and that it must be shown that the amount of activity on the part of employee is considerable and extensive. We believe that a decision adopting the rule promulgated by the Administrator of the Wage and Hour Law would remove the conflict in interpretation, by the various courts, that now exists. Until this is determined prolific litigation will ensue, particularly in the territory presided over by the U. S. Circuit Court of Appeals for the Ninth Circuit. The 20% rule promulgated by the Administrator has been approved in the cases of *Callus v. 10 East Fortieth Street Bldg.*, 146 F. (2d) 438 (Second Circuit); *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (dissenting opinion of J. Sibley, Fifth Circuit); *Vogelpohl v. Lane Drug Co.*, 55 F. S. 564 (Sixth Circuit); *Anuchick et al v. Transamerican Freight Lines*, 46 F. S. 861 (Michigan Second Circuit).

The Ninth Circuit Court quoted from *Walling v. Jacksonville Paper Co.*, as follows:

> "'If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act.'"

Thereafter, this Court made the following statement in its opinion:

> "This statement throws no light on what percentage of an employee's time in interstate commerce is unsubstantial."

In its opinion the Ninth Circuit conceded that employees whose activities merely affected interstate commerce were not covered by the Fair Labor Standards Act, and thereafter added the following words:

> "However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act."

and concludes its opinion with the following:

> "We agree with the opinion of the Tenth Circuit In *New Mexico Public Service v. Engel,* 145 F. (2d) 636, that an employee occupied in interstate commerce in an enterprise but four percent of which is interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged."

## Conclusion.

In conclusion petitioner respectfully contends that it has shown fully that the Circuit Court of Appeals for the Ninth Circuit has erred in its decision herein involving the important question of jurisdiction. That the decision is in conflict with the decisions in other Circuits on the same point. That in view of these conflicting decisions an interpretation of the words "substantial part" as used by this Court in *Walling v. Jacksonville Paper Co., supra,* is necessary. A denial of this petition and Writ of Certiorari will leave unsettled the rights of many employees and the liabilities of many employers.

Respectfully Submitted,

HUGH GORDON,
H. J. BISCHOFF,
*Counsel for Petitioner.*

**Certificate.**

We hereby certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel well founded in law and proper to be filed herein.

HUGH GORDON,

H. J. BISCHOFF,

*Counsel for Petitioner.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of October, A. D. 1945.

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